



United States Attorney
Southern District of New York

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March 31, 2023

BY ECF

Hon. Denise L. Cote
United States District Court
Southern District of New York
500 Pearl Street, Room 1610
New York, New York 10007

Re: *New York Times & Khan v. U.S. Department of Defense,*
22 Civ. 9481 (DLC)

Dear Judge Cote:

Counsel for Plaintiffs The New York Times Company (“The Times”) and Azmat Khan (“Khan”) (collectively, “Plaintiffs”) and Defendant the United States Department of Defense (“DoD”) write respectfully in this action brought pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), to update the Court on the status of this matter and to propose a plan for further proceedings in this matter.

This case concerns four FOIA requests submitted by Khan, a reporter with The Times, seeking records from three DoD components relating to reported civilian casualties from military operations. Khan submitted one FOIA request to the United States Africa Command (“AFRICOM”), two requests to the United States Central Command (“CENTCOM”), and one request to the United States Army (“Army”). Over the past month, the parties have met and conferred regarding a proposed schedule for further proceedings. The status of DoD’s processing of the requests is set forth below, along with the parties’ agreements on a proposed schedule.

1. The AFRICOM Request

The FOIA request to AFRICOM seeks records concerning 37 alleged incidents of civilian casualties. As set forth in the parties’ joint letter dated March 1, 2023, AFRICOM has completed its search and identified 174 potentially responsive records, comprising approximately 1200 pages. Most if not all of the responsive records reside on classified record systems, contain classified information, and implicate the equities of multiple components within AFRICOM, other combatant commands, and other components or agencies. AFRICOM expects to process the records on a rolling basis, but will need to refer most if not all of the documents to other components or agencies for consultation.

To date, AFRICOM has nearly completed processing the records relating to 11 of the 37 reported incidents, totaling approximately 400 pages, for AFRICOM equities. AFRICOM expects to complete its internal processing of this first batch of records within approximately 10 days,

although that time period could expand if additional coordination is required. Should AFRICOM require additional time beyond one week to complete processing of these records, it will seek an extension from the Court. These records are also the subject of pending consultations with other DoD components.

AFRICOM has agreed to process records for AFRICOM equities at the same rate that CENTCOM has been processing records in *Khan v. DoD*, 18 Civ. 5334 (DLC) (“*Khan I*”), and *Khan v. DoD*, 21 Civ. 8105 (DLC) (“*Khan II*”)—300 pages every 60 days¹—although AFRICOM has advised The Times that it may be required to request extensions from time to time, given its limited FOIA processing resources.² Once AFRICOM has completed its processing of the first batch of approximately 400 pages, it will begin processing the next batch of approximately 300 pages.

At The Times’s request, AFRICOM has also agreed to assign an administrative processing number to Ms. Khan’s FOIA request. AFRICOM will attempt to issue a number that reflects the sequence in the queue in which the request is received, if the system allows.

2. The Baghuz Requests to Army and CENTCOM

Two of the FOIA requests at issue in this case—the request submitted to Army and one of the two requests submitted to CENTCOM—concern a civilian casualty incident in Baghuz, Syria on March 18, 2019. The Secretary of Defense tasked U.S. Army General Michael X. Garrett, then-commander of U.S. Army Forces Command, to conduct an independent review of the incident, which was completed in late 2021.

The FOIA request to Army seeks General Garrett’s report and the evidentiary materials he considered. As DoD previously reported to the Court, Army completed its search for records responsive to the Army request and referred those requests to the Office of Secretary of Defense (“OSD”) for review and coordination. OSD has now reviewed the records for responsiveness and referred the responsive records to CENTCOM for processing because the classified information in the records is within CENTCOM’s purview.³ These records consist of General Garrett’s report (61 pages), an addendum to the report (28 pages), and the material he considered. Altogether, there are approximately 100 responsive documents totaling about 3000 pages, video feeds totaling approximately 10 hours, and 2 press report videos totaling about 10

¹ This does not include any consultations with other DoD components or agencies that may be required.

² AFRICOM is a relatively small combatant command based in Germany, with limited resources to process this and other FOIA requests. At present, three subject matter experts are involved in reviewing the responsive records, in addition to their primary operational duties. AFRICOM has only two FOIA personnel—both of whom are recently assigned to these duties to replace departing personnel—who are coordinating the review and consultations and applying redactions to exempt information.

³ Although CENTCOM will be the component principally responsible for processing the request, other components (including OSD) will be consulted, and OSD will review and approve any withholdings.

minutes. The parties will continue to meet and confer to determine whether any records (such as press reports and other publicly available material) can be scoped out of the Army request.

CENTCOM has agreed to process records the records referred by OSD/Army at a rate of 150 pages every sixty days, with the 60-day periods staggered with those in *Khan II*.⁴ The next *Khan II* production is due at the end of May, and thus CENTCOM would complete its review of the first 150 pages referred by OSD/Army by the end of June. Those pages would include General Garrett's report and addendum (collectively totaling 89 pages). Like AFRICOM, CENTCOM has advised The Times that it may be required to request extensions from time to time, given its resource constraints and other processing obligations, including in *Khan I* and *II*.⁵ CENTCOM is willing to revisit the processing rate in this case after the second production (at the end of August), after it has had an opportunity to add personnel to the FOIA shop and train them. CENTCOM cannot guarantee that it will be able to increase its processing rate at that time, but CENTCOM will make a fresh evaluation of whether it is reasonably practicable to increase the processing rate.

The parties agree that CENTCOM will hold the separate CENTCOM request regarding the Baghuz incident in abeyance pending its processing of the records responsive to the Army request.

3. The CENTCOM Payments Request

The second request to CENTCOM seeks records concerning 65 condolence or *ex gratia* payments referred to in a DoD report and one payment identified in congressional correspondence, as well as records concerning the underlying incidents that led to the payments. CENTCOM is currently conducting a search for records responsive to this request. CENTCOM anticipates completing that search in less than 60 days, in time to report the results to The Times and the Court in the next status report, which the parties propose to file on or before May 31, 2023.

We thank the Court for its consideration of this letter.

*Sticker letter is due
5/31/23.
Sarah S. Normand
4/3/23*

Respectfully,

DAMIAN WILLIAMS
United States Attorney

By: /s/ Sarah S. Normand

⁴ As in *Khan II*, CENTCOM's completion of processing of a particular batch of records may not always result in a production of records to Plaintiff, as records may be withheld in full or referred to other DoD components for consultation.

⁵ Currently, there are only two staff in CENTCOM's FOIA shop who have substantial experience processing the kinds of classified records at issue in this case and in *Khan I* and *II*; the next most senior person has only been in the position for about 90 days. These records are particularly complicated to process. They require multiple levels of review within CENTCOM, consultations with other combatant commands, and review by OSD as well as an original classification authority within CENTCOM.

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